

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JESSICA C BREWER
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TYSON RETAIL DELI MEATS INC
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-02116-DT
OC: 01/22/06 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jessica C. Brewer (claimant) appealed a representative's February 9, 2006 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Retail Deli Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 10, 2006. The claimant participated in the hearing. Brooke Salger appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 14, 2003. She worked full time as a production worker at the employer's Independence, Iowa meat processing facility. Her work schedule was 6:00 a.m. to approximately 2:30 p.m., Monday through Friday. Her last day of work was January 25, 2006. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a 14-point attendance policy. Prior to January 24, 2006, going back for last 12 months of the claimant's employment, she incurred the following attendance occurrences:

Date	Occurrence/reason if any	Points assessed
01/31/05	Left and returned, dog got out.	0.5 point.
02/05/05	Absence, sick.	1.0 point. (01.5 cum.)
02/22/05	Late, car trouble.	1.0 point. (02.5 cum.)
03/14/05	Absence, sick.	1.0 point. (03.5 cum.)
04/11/05	Absence, home injury.	1.0 point. (04.5 cum.)
05/13/05	Absence, sick.	1.0 point. (05.5 cum.)
05/27/05	Absence, sick.	1.0 point. (06.5 cum.)
07/07/05	Absence, sick.	1.0 point. (07.5 cum.)
07/18/05	Absence, sick 9- or 10-year old child.	1.0 point. (08.5 cum.)
07/21/05	Tardy 39 min., overslept.	1.0 point. (09.5 cum.)
08/16/05	Left early, personal sick.	0.5 point. (10.0 cum.)
09/09/05	Left early, personal sick.	0.5 point. (10.5 cum.)
09/19/05	Absence, personal sick, not released.	1.0 point. (11.5 cum.)
10/25/05	Left and returned for court appointment.	0.5 point. (12.0 cum.)
11/21/05	Left early, personal sick.	0.5 point. (12.5 cum.)
01/04/06	Left and returned to pay ticket.	0.5 point. (13.0 cum.)
01/16/06	Left early, personal sick.	0.5 point. (13.5 cum.)

At least a couple of the absences due to sickness were also due to a sick 9- or 10-year old child. During this period, she received at least two written warnings, one on May 4, 2005 which stated that at that time she was at 10.5 cumulative points (including other points that fell off between May 4, 2005 and January 24, 2006), and a warning on January 17, 2006 for when she had left early on January 16, 2006 (miswritten as January 16, 2005) that informed her that she was at 13.0 cumulative points.

On January 24, 2006 the claimant reported for work at 6:09 a.m.; she was late because her boyfriend, who also worked at the employer and with whom the claimant lived and carpooled to work, was running late, and the claimant's own car would not start, so she could not leave for work ahead of him. She was assessed one point for this tardy; her cumulative points then reached 14.5 points. The claimant asserted that she should have been given further opportunity to provide court documentation that would have removed a half-point for the partial absence for a court appointment on October 25, 2005; however, the employer concluded that it was too late and would make no difference, as she would still be at 14 points, which is still termination. The claimant further asserted that she was not properly informed of her points as her final warning only said she was at 13.0 points, not 13.5 points. It appears that prior to January 24, 2006 the

employer was in fact not counting the half-point for October 25, 2005 in anticipation that the claimant would be presenting the promised documentation, so the January 17, 2006 warning accurately reflected the 13.0 points the claimant would have had if she had provided the necessary documentation for the October 25 half-point.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a, (7) provide:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant's final occurrence was not excused and was not due to illness or other reasonable grounds. Absences due to issues that are of purely personal responsibility such as transportation issues are not excusable. Higgins, supra.; Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant had previously been warned that future occurrences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's February 9, 2006 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 25, 2006. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

ld/tjc